RECENT CASES.

BANKRUPTCY — PREFERENCES — EFFECT OF NEW CREDITS AND PARTIAL PAYMENTS. — A creditor, ignorant of his debtor's insolvency, advanced goods from time to time, and received partial payment for each advance about a month later. The total effect of these transactions was that the debt had increased at the time of bankruptcy. *Held*, that these payments need not be surrendered as preferences under § 57*g*, before proof of other claims can be made. *In re Dickson*, 111 Fed. Rep. 726 (C. C. A., First Circ.).

The court holds that though the fact that the payments were received innocently would not by itself prevent their being preferences which must be surrendered as a condition of making proof, yet regarding not simply each payment, but the whole course of dealing and the increase of the debt, they were not such as § 57*g* was intended to include. Such a decision seems obtainable only by reading in an exception not expressed in the Act, which makes no distinction in this respect as to preferences under different circumstances. Nevertheless, any other construction would work immense hardship to innocent preferred creditors who often could not afford to prove. The provision on this point is a new one in bankruptcy legislation, and apparently an unpopular one, to avoid which the cases indicate that many judges are willing to strain a point. *Cf. McKey* v. *Lee*, 105 Fed. Rep. 923, and the dissent of four judges in *Pirie* v. *Chicago, etc., Co.*, 182 U. S. 438; and see 15 HARV. L. REV. 232. It seems very probable therefore that the decision of the principal case will stand.

BANKRUPTCY — PREFERENCES TO CREDITOR — RIGHTS OF SURETY. — A creditor received preferences on one of his claims from an insolvent, the creditor being ignorant of the insolvency. On the bankruptcy of the debtor, his surety on this debt paid the rest of it. The creditor and the surety each had other claims against the estate, which they wished to prove. *Held*, that the court may transfer from the creditor to the surety the obligation to refund the preferences, as a condition of making proof. *In re Siegel-Hillmon, etc., Co.*, 111 Fed. Rep. 980 (Dist. Ct., E. D. Mo.). See NOTES, p. 663.

BANKRUPTCY — SURRENDER OF PREFERENCES — SET-OFF OF NEW CREDITS. — A creditor, having innocently received certain preferences, made further unsecured advances in good faith. The Bankruptcy Act, § 60*b*, provides for recovery by the trustee of preferences received with notice, and § 60*c* allows such advances as those here in question to be set off by a preferred creditor "against the amount which would otherwise be recoverable from him." *Held*, that such advances may be set off against the amount of preferences received *bona fide*, which the trustee could not force to be returned, but which by § 57*g* must be surrendered before other claims are provable. *Peterson* v. *Nash Bros.*, 112 Fed. Rep. 311 (C. C. A., Eighth Circ.).

To construe "the amount . . . recoverable" to mean "the amount not recoverable, but which must be surrendered in order to prove other claims," seems rather far fetched. It is urged that any other construction would give the creditor who receives a preference knowingly and resists its repayment, an advantage over the innocent preferred creditor who cannot be sued. It has been held, however, that one who has knowingly received a preference which the trustee recovered only by suit, has not "surrendered" so as to be able to prove in the bankruptcy proceedings. *In re Owings*, 109 Fed. Rep. 623; see 15 HARV. L. REV. 314. Like the innocent creditor, then, the creditor who has knowingly been preferred must make a voluntary surrender, and in doing so, since there is no provision as to set-off in connection with surrenders, he stands on exactly the same footing as the innocent creditor. It is therefore hard to see how the latter is at a disadvantage, and consequently the strained construction which the court puts on the Act is not easy to justify. In accord with the principal case is *McKey* v. *Lee*, 105 Fed. Rep. 923 (C. C. A.). For district court decisions on both sides, see *In re Southern, etc., Co.*, 111 Fed. Rep. 518.

BILLS AND NOTES — NEGOTIABLE INSTRUMENTS LAW — NOTE IMPROPERLY DELIVERED WITH NAME OF PAYEE OMITTED — BLANK CHARGING PURCHASER WITH NOTICE. — The defendant, as surety for one G., signed a promissory note with the

name of the payee left in blank, on the understanding that the note should be made payable to one of two banks in taking up a previous note. G. sold the note to the plaintiff who, acting throughout in good faith, took for value and later filled in his own name. The Negotiable Instruments Law, § 14, provides that such a note, if not filled up in accordance with the original authority, cannot be enforced unless after completion it is negotiated to a holder in due course. *Held*, that the plaintiff cannot recover since the note was not negotiated to him "after completion." *Guerrant* v. *Guerrant*, 7 Va. L. Reg. 639 (Va., Corp. Ct.).

At common law a maker or a surety who issues an incomplete note, gives implied authority to fill the blanks, and is liable to a *bona fide* holder for value though the actual authority given has been exceeded. *Bank of Pittsburg* v. *Neal*, 22 How. (U. S. Sup. Ct.) 96. The American courts applied this rule when such a holder took the note before completion and filled the blanks in good faith in excess of the original authority. *Fullerton* v. *Sturges*, 4 Oh. St. 530; *cf. Huntington* v. *Branch Bank*, 3 Ala. 186. The English doctrine was that a blank charged the purchaser with notice and that he must at his peril ascertain the extent of the authority conferred. *Awde* v. *Dixon*, 6 Exch. 869. By the insertion of the words "after completion" the English rule was incorporated in the Bills of Exchange Act, § 20, and in our law, whose provision is identical, and the decision of the court seems therefore clearly correct. There apparently have been no previous decisions on the point under these Acts. According to the rather unsatisfactory ruling of a recent English decision, the plaintiff in the principal case would be barred on the further ground that the note was not "negotiated" to him. *Herdman* v. *Wheeler*, 18 T. L. R. 190 (K. B.). See 15 HARV. L. REV. 579.

BILLS AND NOTES — THEFT BEFORE DELIVERY — ESTOPPEL BY NEGLIGENCE. — The person named as payee in a paper in the form of a note, made by the defendant for amusement, abstracted it from other papers during the defendant's absence from the room, and afterwards negotiated it to the plaintiff, an innocent purchaser. *Held*, that the defendant is not liable on the note. *Salley* v. *Terrill*, 50 Atl. Rep. 896 (Me.).

A contrary result has been reached in some similar cases. *Shipley* v. *Carrol*, 45 Ill. 285. There being no delivery, however, the note has never had any legal inception, and the maker should not be held liable, unless he is estopped by negligence to deny delivery. *Burson* v. *Huntington*, 21 Mich. 415. There is some ground to contend that the defendant here was negligent in leaving the instrument in the same room with the payee, but it is doubtful if this is sufficient to constitute negligence. It was not so considered in *Burson* v. *Huntington*, *supra*. A maker who leaves paper payable to bearer in a public place would, however, probably be estopped to dispute delivery. Cases dealing with bank notes and treasury notes, where liability exists regardless of the care used, may be distinguished as resting on grounds of public policy. The issuance of such instruments is authorized with the intention that they shall pass from hand to hand as currency, and the public in treating them as such must be protected. See *Worcester County Bank* v. *Dorchester, etc., Bank*, 10 Cush. (Mass.) 488; *Cooke* v. *United States*, 91 U. S. 389.

CARRIERS — AGENCY — LIABILITY FOR INSULT TO PASSENGERS. — A railway conductor impliedly accused a passenger, in the hearing of other passengers, of dishonesty in trying to evade the payment of fare. Action was brought against the railway company for the humiliation caused thereby. *Held*, that the company is liable. *Texas & Pac. Ry. Co.* v. *Tarkington*, 66 S. W. Rep. 137 (Tex., Civ. App.).

This case illustrates very neatly the peculiar liability of the carrier of passengers. The language used by the conductor was not actionable *per se* nor was such special damage shown as would ground an action for slander. Obviously, then, under the ordinary circumstances of life, recovery could not be had either from the agent or from his employer. A common carrier, however, has from the earliest times been bound to use the utmost care and vigilance to guard the safety of his passengers. Gradually the duty of guarding against violence grew to include protection against such abusive and insulting language and disorderly conduct as could reasonably be foreseen. See *Chicago, etc., R. R. Co.* v. *Flexman*, 103 Ill. 546; *Putnam* v. *Broadway, etc., R. R. Co.*, 55 N. Y. 108. Accordingly the carrier is properly held liable where one of his servants fails to prevent such conduct, when, by reasonable diligence, he might do so. This liability clearly includes cases of improper conduct by the servants themselves. Hence recovery has been had against the carrier for assaults by his servants, even where the servants' acts had no connection whatsoever with their employment. *Craker* v.

Chicago & N. W. Ry. Co., 36 Wis. 657; *Goddard* v. *Grand Trunk Ry.*, 57 Me. 202. The principal case, then, would seem to be merely a further application of the recognized doctrine.

CONSTITUTIONAL LAW — EMINENT DOMAIN — EASEMENTS OF LIGHT AND AIR — ELEVATED RAILROADS. — A steam railroad company had acquired the right to run its trains through the street in front of the plaintiff's premises. In accordance with a legislative scheme for the improvement of the street, the railroad tracks were raised upon an elevated structure and the trains operated thereon. The plaintiff sued the railroad company for injury to his easements of light and air. *Held*, that he cannot recover. *Fries* v. *New York & H. R. R.*, 169 N. Y. 270. See NOTES, p. 665.

CONTRACTS — PAST CONSIDERATION — IMPLIED PROMISE. — The plaintiff, at the defendant's request, supported the defendant's mother during an illness. Subsequently the defendant promised to pay the plaintiff for his services. *Held*, that a declaration based on this promise is good on demurrer. *Montgomery* v. *Downey*, 88 N. W. Rep. 810 (Ia.).

In early times it was thought that a promise was sufficiently supported by the consideration of a detriment already incurred by the promisee at the request of the promisor. *Anon.*, cited in *Hunt* v. *Bate*, Dyer 272; *Lampleigh* v. *Brathwaite*, Hob. 105. While these cases have never been expressly overruled, they seem to have been entirely discredited by the rejection of the doctrine of past consideration. *Cf. Hopkins* v. *Logan*, 5 M. & W. 241. The old rule is still laid down by some text-writers and in *dicta* in various jurisdictions. See 1 PARSONS, CONTS., *469; *Dearborn* v. *Bowman*, 3 Met. (Mass.) 155, 158; *contra*, ANSON, CONTS., 9th ed., 102 *et seq.* It has influenced not only the principal case, but several other modern American decisions where the declaration was on the subsequent express promise. *Pool* v. *Horner*, 64 Md. 131; *Stuht* v. *Sweesy*, 48 Neb. 767. In most of these cases, however, the subsequent promise was coextensive with the promise which the facts would imply, and in all, it is believed, a *quantum meruit* would have been supported. In such cases practically the same result would be achieved by the modern doctrine of implied promises, and so the survival of the old principle seems to affect only the form of the declaration and in some cases, perhaps, the amount of damages awarded. See *Ex parte Ford*, 16 Q. B. D. 305, 307.

CORPORATIONS — BY-LAWS — DIVERSION OF MORTUARY FUND INTO HANDS OF MEMBERS. — In pursuance of a charter amendment, the defendant corporation passed a by-law providing for assessments from time to time to make up a mortuary fund to be paid to widows and children of deceased members. Later a new by-law was passed modifying the system and providing, *inter alia*, for the distribution of the accumulated fund among the subscribing members. *Held*, that the new by-law is invalid. *Parish* v. *New York Produce Exchange*, 169 N. Y. 34.

The authorities on this subject are in hopeless conflict and confusion. See BOISOT, BY-LAWS, §§ 118–131. All by-laws must be reasonable and within the chartered powers of the corporation, but beyond this it is well-nigh impossible to lay down any definite principles. Vested rights cannot be impaired, but the cases differ widely as to what constitutes a vested right. See *Stohr* v. *San Francisco Musical Fund Society*, 82 Cal. 557. The interest of each member in the mortuary fund is acquired with reference to the charter and by-laws of the corporation, and the latter are naturally subject to considerable modification by by-laws later passed in the way of amendment. See *Pain* v. *Société St. Jean Baptiste*, 172 Mass. 319; but *cf. Becker* v. *Berlin Beneficial Society*, 144 Pa. St. 232. The subscribing members, however, clearly acquire some rights in the fund, and their interest, though a limited one, entitles them to insist that the fund be kept within the general scope of the purpose for which it was collected and not otherwise disposed of or diverted into new channels. *Cf. Lloyd* v. *Supreme Lodge K. of P.*, 98 Fed. Rep. 66; *Bergman* v. *St. Paul Mut. Bldg. Assoc.*, 29 Minn. 275. A sweeping amendment like the one in question seems therefore sufficient to give a right of action.

CORPORATIONS — CONSOLIDATION — TRANSFER OF ENTIRE PROPERTY TO ANOTHER CORPORATION — RIGHTS OF CREDITORS. — *Held*, that a corporation formed by consolidation is liable at law for the debts of each constituent corporation, at least to the extent of the assets received. *Morrison* v. *American Snuff Co.*, 30 So. Rep. 723 (Miss.).

All the property of one corporation was transferred to another, which took with notice of certain liabilities of the former corporation. *Held*, that the property is chargeable in equity for those liabilities. *Vicksburg, etc., Co.* v. *Citizens', etc., Co.*, 30 So. Rep. 725 (Miss.).

When one corporation transfers all its property to another distinct corporation, and in consideration therefor the shareholders of the first are made members of the second, creditors of the first are in almost every jurisdiction given, both in equity and at law, relief against the second, and this, too, in the absence of statute or express agreement between the corporations. *Harrison* v. *Arkansas Valley Ry. Co.*, 4 McCrary (U. S. Circ. Ct.) 264; *Cleveland, etc., Ry. Co.* v. *Prewitt*, 134 Ind. 557; see 14 HARV. L. REV. 531. The grounds for relief are generally, however, not satisfactorily developed. When fraudulent as to creditors the conveyance may, of course, be set aside. *Hurd* v. *New York, etc., Co.*, 167 N. Y. 89. But usually, it would seem, the intention is that the second corporation shall assume the debts of the first. Then equitable relief may be justified on the ground that the assets of the first corporation are to be considered as transferred with the obligation attached, so that the second corporation holds them subject to a trust for creditors; or an action at law may be based on a promise to assume the debts, implied in the agreement between the corporations, the creditors being allowed to sue as beneficiaries on the principle of *Lawrence* v. *Fox*, 20 N. Y. 268. Consistently with this latter suggestion, the creditor's right at law against the second corporation has been denied in Massachusetts, where *Lawrence* v. *Fox*, *supra*, is not followed. *Ewing* v. *Composite, etc., Co.*, 169 Mass. 72.

CORPORATIONS — VOIDABILITY OF CONTRACTS IN WHICH DIRECTORS OR OFFICERS HAVE A SPECIAL INTEREST. — Corporation A, acting through its general manager, who was also largely interested in corporation B, made a series of contracts with the latter corporation. The court found that the contracts were fair. *Held*, that they will not be set aside at the suit of corporation A. *Aldine Mfg. Co.* v. *Phillips*, 88 N. W. Rep. 632 (Mich.).

The rule is well settled that one acting for another in a fiduciary capacity cannot make a valid contract where he has a substantial interest conflicting with his duties. See *New York, etc., Co.* v. *National, etc., Co.*, 14 N. Y. 85, 91. When the directors of a corporation make a contract in which some of them have a special interest, that individual interest is almost always to some extent opposed to the duty of the directors acting as a board. A few cases accordingly allow the corporation to avoid the contract, without regard to the number of interested directors. *Aberdeen Ry. Co.* v. *Blaikie*, 1 Macq. 461. But many courts are not anxious to hamper all dealings between corporations having some directors in common, and will not generally set aside a fair contract when the directors in common form a minority, and the adverse interest is consequently of less effect. See *Jesup* v. *Illinois Central R. R. Co.*, 43 Fed. Rep. 483; *United States, etc., Co.* v. *Atlantic, etc., R. R. Co.*, 34 Oh. St. 450. When, however, as in the principal case, the contract is made by a single officer or other agent of the corporation, having a special interest, it is clearly voidable according to the general rule and the decisions in point. *Greenwood, etc., Co.* v. *Georgia., etc., Co.*, 72 Miss. 46.

CRIMINAL LAW — FORMER JEOPARDY — MUNICIPAL ORDINANCE AND STATE STATUTE. — The defendant, having been convicted and fined for violation of a city ordinance against gambling, was indicted for the same act as a violation of a state statute. *Held*, that a plea of former jeopardy is without merit, the prosecution under the ordinance being in the nature of a civil proceeding. *State* v. *Muir*, 65 S. W. Rep. 285 (Mo.). See NOTES, p. 660.

CRIMINAL LAW — SOLICITATION — ATTEMPT — JURISDICTION. — The prisoner wrote in London a letter to B in Johannesburg, soliciting murder. There was no evidence of the receipt of the letter. He was indicted under 24 & 25 Vict., c. 100, § 4, which makes it a misdemeanor to "solicit, encourage, persuade, or endeavor to persuade," or to "propose to" another to commit murder. There were counts for the substantive offence, and also for an attempt. *Held*, that the jury may convict on the latter counts, but to sustain the former there must be evidence of communication. *Rex* v. *Krause*, 18 T. L. R. 238 (Cent. Crim. Ct.).

The decision that the solicitation was incomplete seems correct. *Regina* v. *Fox*, 19 W. R. 109 (Ir.). The court allowed the counts for attempt on the assumption, probably, that the complete offence would be indictable in England. It would seem,

however, that the criminal act in such cases is the communication, which would have been in another jurisdiction, and that, consequently, any indictment must have been brought there. This view is supported by at least one class of cases, — where forgeries are uttered by mail. *Lindsey* v. *State*, 38 Oh. St. 507. But the contrary might be held on analogy to cases of libel by mail, where the jurisdiction is concurrent. *Rex* v. *Burdett*, 4 B. & Ald. 95. If the completed offence would have been cognizable only abroad, a question arises as to indicting the attempt in England. It would seem that acts sufficient in themselves to constitute an attempt, done in pursuance of a criminal end, are properly indictable where done, even though the offence when completed would be against another sovereignty. Such was the holding in the only case found where the point has been decided. *State* v. *Terry*, 109 Mo. 601. Cases of accessory in another jurisdiction, and of conspiracy to commit crime abroad, lead by analogy to the same conclusion. *State* v. *Chapin*, 17 Ark. 561; *People* v. *Arnold*, 46 Mich. 268.

DAMAGES — CONTRACT OF SERVICE — SERVANT WORKING FOR HIMSELF AFTER DISMISSAL. — The plaintiff, a plantation foreman, was under contract with the defendant for a year at $500. Having been wrongfully discharged, he leased a farm and managed it during the rest of the year, making $100. *Held*, that the measure of damages in an action on the contract is the contract price, decreased by the amount that the plaintiff must have paid another to do the work which he did on the leased farm. *Lee* v. *Hampton*, 30 So. Rep. 721 (Miss.). See NOTES, p. 662.

DAMAGES — MITIGATION — ASSAULT AND BATTERY — PROVOCATION. — In an action for assault and battery the defendant offered to prove in mitigation of damages threats made by the plaintiff. *Held*, that the evidence is inadmissible. *Mangold* v. *Oft*, 88 N. W. Rep. 507 (Neb.).

The decision goes on the ground that the threats, if proved, would have no legitimate bearing on the case. It is almost universally agreed that evidence of threats or provocation is admissible in mitigation of exemplary damages. *Corcoran* v. *Harran*, 55 Wis. 120. But some jurisdictions refuse to allow such evidence to mitigate compensatory damages, on the ground that to do so would virtually be to allow it to be used as a defence to the action. *Scott* v. *Fleming*, 16 Ill. App. 539; *Prentiss* v. *Shaw*, 56 Me. 427. It would seem, however, that evidence of this nature has a direct bearing on the actual damage; for, if the plaintiff provoked the assault, there is naturally less outrage and injury to his feelings than if he had been entirely blameless in the matter, and consequently his actual damage is less. In accordance with this view many jurisdictions admit the evidence in mitigation of both exemplary and compensatory damages. *Parker* v. *Coture*, 63 Vt. 155; *Robison* v. *Rupert*, 23 Pa. St. 523. It must always appear, of course, that the assault was committed under the immediate influence of the provocation. *Keiser* v. *Smith*, 71 Ala. 481.

EVIDENCE — ADMISSIBILITY — VERDICT OF CORONER'S JURY. — At a trial for murder, the prosecution introduced as evidence the verdict of the coroner's jury that the defendant had killed the deceased, and that "said killing was in our opinion, a cold-blooded murder." *Held*, that the evidence was incompetent. *Colquit* v. *State*, 64 S. W. Rep. 713 (Tenn., Sup. Ct.). See NOTES, p. 663.

EVIDENCE — DECLARATIONS AS TO BOUNDARY MADE POST LITEM MOTAM. — At a trial of a boundary dispute, proof was offered of declarations as to the location of the boundary, which were made by an old resident in the neighborhood, since deceased. The declarations were made after the dispute arose. *Held*, that the evidence was properly rejected. *Hamilton* v. *Smith*, 50 Atl. Rep. 884 (Conn.).

The admission of pedigree and public interest declarations manifests the ancient practice of proving certain facts by hearsay traditional in the family or community. The American practice, recognized in the principal case, of admitting declarations as to private boundary, had the same origin. THAYER, CAS. EV., 2nd ed., 418, 419; *Higley* v. *Bidwell*, 9 Conn. 446. In accordance with a decision rendered a century ago, pedigree declarations are inadmissible if made after the controversy which is before the court arose, the declarant being considered as probably voicing then his individual opinion rather than family reputation, or perhaps as collusively making evidence. *Berkeley Peerage Case*, 4 Camp. 401. A similar decision as to public interest declarations followed immediately. *Rex* v. *Cotton*, 3 Camp. 444. The rule in the principal case follows not unnaturally. Generally, however, declarants as to private boundaries

must have been disinterested, and in many jurisdictions specially informed. *Porter* v. *Warner*, 2 Root (Conn.) 22; *Clements* v. *Kyles*, 13 Grat. (Va.) 468, 478. These restrictions, treating the declarant rather as an unsworn witness, testifying of his own knowledge, involve an abandonment of the old conception of him as the mouthpiece of tradition. See *Moseley* v. *Davies*, 11 Price 162, 167, 174. These methods of insuring genuineness might be considered complete substitutes for the *ante litem motam* condition; but they have not been so considered, and one decision and many *dicta* support the principal case. *Den* v. *Sugg*, 2 Dev. & Bat. (N. C.) 515.

EVIDENCE — HUSBAND AND WIFE — COMPETENCY AS WITNESSES AFTER DIVORCE. — The defendant in the presence of his wife committed an assault on one G. *Held*, that the wife after divorce can testify against him. *Commonwealth* v. *Leisey*, 59 Leg. Intel. 48 (Pa. Dist. Ct.).

In general the incapacity of husbands and wives to be witnesses for or against each other is terminated by death or divorce. Public policy obviously requires, however, that it continue in some measure as to matters which occurred during the marriage. In England the prohibition lasts as to all which took place during the coverture and to which the wife could not have testified at the time. *O'Connor* v. *Marjoribanks*, 4 Man. & G. 435. The American cases show a wide variation, but the most common statement is that the wife remains incompetent against her husband as to knowledge obtained through the confidence of the marriage relation. *Walker* v. *Sanborn*, 46 Me. 470; *Babcock* v. *Booth*, 2 Hill (N. Y.) 181. The incompetency has been generally extended to matters such as that in the principal case, affecting the character of the former husband, either as coming under the rule last stated or as a separate class. *State* v. *Jolly*, 3 Dev. & Bat. (N. C.) 110; *cf. French* v. *Ware*, 65 Vt. 338; *contra*, *Chamberlain* v. *People*, 23 N. Y. 85. It is sufficiently probable that the wife's prejudicial knowledge of such matters was allowed to reach her in that confidence which the law protects, to make the application of an absolute rule of incompetency seem on the whole wise and just.

INSURANCE — POLICY TAKEN OUT BY INSURED — RESULTING TRUST. — The insured took out a life insurance policy for the benefit of one to whom he was not related, payable to her, her executors, administrators, and assigns. The insured died after the beneficiary. *Held*, that the representatives of the beneficiary are entitled to receive the proceeds of the policy, but must hold them subject to a resulting trust in favor of the estate of the insured. *In re a policy in the Scottish Eq. Life Ass. Soc.*, 112 L. T. 197 (Eng., Ch. D.).

When property is purchased and title taken in the name of a stranger, it is the general rule that there is a presumption of a resulting trust for the donor. *Finch* v. *Finch*, 15 Ves. Jun. 43; see *Dyer* v. *Dyer*, 2 Cox 92. But this doctrine does not seem ever before to have been applied to life insurance policies, where the usual purpose is to make a gift to the beneficiary, and where therefore no presumption of a contrary intent is ordinarily well founded. It is general law that one who takes out a policy on his own life may make it payable to whom he pleases. *Ashley* v. *Ashley*, 3 Sim. 149; *Langdon* v. *Union, etc., Ins. Co.*, 14 Fed. Rep. 272. Moreover the payee collects the proceeds of the policy for himself, unless there be strong circumstances to show another intention. *Fairchild* v. *Northeastern, etc., Assoc.*, 51 Vt. 613; *Scott* v. *Dickson*, 108 Pa. St. 6; see *American, etc., Ins. Co.* v. *Robertshaw*, 26 Pa. St. 189. Even when the designated beneficiary dies before the insured, there is strong authority for the rule that his entire interest descends to his representatives. *Swan* v. *Snow*, 11 Allen (Mass.) 224; *contra*, *Ryan* v. *Rothweiler*, 50 Oh. St. 595. Moreover in the principal case the representatives of the beneficiary were designated, which furnishes an additional reason for allowing them to take, like the original beneficiary, for their own benefit. See *Glanz* v. *Gloekler*, 104 Ill. 573.

INTERNATIONAL LAW — EXTRADITION — ACTS CONSTITUTING DIFFERENT CRIMES IN THE TWO COUNTRIES. — The United States, on behalf of the State of Washington, asked for the extradition of a fugitive upon evidence which made out a case of larceny by embezzlement within the definition of the Washington statutes. In England, the same evidence showed neither larceny nor embezzlement, but it did show the crime of "fraud by a banker" within § 81 of the Larceny Act; which was an extraditable offence under the Extradition Act of 1870, and the Treaty of 1889 with the United States. The prisoner sued out a writ of *habeas corpus*. *Held*, that he must be remanded for extradition. *Rex* v. *Dix*, 18 T. L. R. 231 (K. B.).

In the absence of an extradition treaty or an empowering statute, it would seem that there is no right or power in the executive of this country or of England to arrest and return to another country fugitives from justice. See 14 HARV. L. REV. 607; CLARKE, EXTRADITION, 3d ed., 123. In fact, statutes are passed only to authorize or to apply treaties. It follows, then, that extradition can be had only in accordance with the provisions of the treaty. In construing such treaties, it is generally held that the facts on which the application for extradition is based, must show *prima facie* a crime by the law of the country to which the application is addressed; that the crime thus made out must be one of those named as extraditable in the treaty; and that the names of crimes in the treaty are to be interpreted according to the law of the country which is asked to grant the extradition. *In re Windsor*, 6 B. & S. 522. The facts which are necessary thus to make out an extraditable crime must also include sufficient facts to show a crime by the law of the demanding country. *In re Tully*, 20 Fed. Rep. 812. These things being shown, it is just and desirable, that extradition should be granted, though the crime made out in one country be not conterminous with that shown in the other, and though it be not known by the same name. *In re Bellencontre*, [1891] 2 Q. B. 122; *In re Arton* (2), [1896] 1 Q. B. 509.

INTERNATIONAL LAW — RENDITION — DESERTERS FROM SHIPS OF WAR. — X, a Russian sailor sent to Philadelphia by the Russian government to man the cruiser Variag, which was being built there, deserted while the vessel was still in the hands of the builders. Art. 9 of the Treaty of 1832 with Russia provides for the arrest, etc., of "deserters from ships of war and merchant vessels of" Russia. *Held*, that X is a deserter from a ship of war within the meaning of the treaty. *Tucker* v. *United States ex. rel Alexandroff*, 22 Sup. Ct. Rep. 195. See NOTES, p. 657.

MORTGAGES — CLOG ON EQUITY OF REDEMPTION — AGREEMENT OUTLASTING THE MORTGAGE. — A lessee of a public-house, in mortgaging his term, purported to bind the land by a covenant that no malt liquors except such as should be bought from the mortgagees should be sold there during the whole term of the lease. *Held*, that this covenant is invalid, as clogging the equity of redemption. *Noakes & Co.* v. *Rice*, [1902] A C. 24.

A controlling stockholder in a company, in mortgaging his stock, contracted that he would use his best endeavors always thereafter to get the mortgagee employment from the company. *Held*, that this contract is enforceable, not being a clog on the equity of redemption. *Carritt* v. *Bradley*, [1901] 2 K. B. 550 (C. A.). See NOTES, p. 661.

MUNICIPAL CORPORATIONS — DE FACTO PUBLIC OFFICER — RECOVERY OF SALARY BY DE JURE OFFICER. — A city in good faith paid to a *de facto* tax collector the percentage usually allowed on collections. Later the plaintiff was declared the rightful holder of the office, and he performed the duties during the remainder of the term. He then joined the city and the *de facto* collector as defendants in a suit to recover fees for the entire term. *Held*, that he may recover from the city such portion as was not paid to the *de facto* collector, and that he may recover from the latter the sums paid to him by the city. *Coughlin* v. *McElroy*, 50 Atl. Rep. 1025 (Conn.).

Emoluments attaching to public offices are commonly treated as incidental to the right to hold the office, not to the actual discharge of duties. See *Nichols* v. *McLean*, 101 N. Y. 526. This results from the historical conception of a public office, not as a contract of employment but as analogous to a grant. See MECHEM, PUBLIC OFFICES, §§ 1–5 Accordingly, it is held that a *de facto* officer cannot enforce payment by the city for services rendered, while the rightful incumbent may recover from the city any balance remaining unpaid, and generally he may recover from the *de facto* officer all benefits received by him. *McCue* v. *County*, 56 Ia. 698; *Dolan* v. *Mayor, etc.*, 68 N. Y. 274; *Nichols* v. *McLean*, *supra*; but *of. Stuhr* v. *Curran*, 44 N. J. Law 181. As to payments already made in good faith, the city is commonly, though perhaps illogically, protected. *Scott* v. *Crump*, 106 Mich. 288; *Dolan* v. *Mayor, etc.*, *supra*; but *contra*, *Andrews* v. *Portland*, 79 Me. 484. Abundant authority thus supports the principal case. It would seem, however, that the ultimate right to remuneration should depend more upon actual service. So, although the city should be compelled to pay no more than the full salary, yet as between the two claimants, the *de facto* officer, provided he has acted in good faith, should have a *quasi*-contractual claim against the *de jure* officer for the fair value of his services, and expenses necessarily incurred. This view is not wholly without authority. *Mayfield* v. *Moore*, 53 Ill. 428; and see *Stuhr* v. *Curran*, *supra*.

PERSONS — HUSBAND AND WIFE — HUSBAND AS AGENT IN WIFE'S BUSINESS — RIGHTS OF HIS CREDITORS. — A wife's success in business was due to the skill of her husband, who conducted the business as her agent. *Held*, that real estate purchased by him in her name with the profits of the business is subject to the husband's debts. *Blackburn* v. *Thompson*, 66 S. W. Rep. 5 (Ky.).

Even assuming that the business here was purchased and carried on with the wife's capital, which is by no means clear from the facts reported, the decision is supported by several well-considered cases, and the modern tendency seems in that direction. *Boggess* v. *Richards's Admr.*, 39 W. Va. 567; *Wilson* v. *Loomis*, 55 Ill. 352. The weight of authority and the general opinion of text-writers is still *contra*, however. *Mayers* v. *Kaiser*, 85 Wis. 382; 2 BISHOP, MARRIED WOMEN, § 454; but *cf.* BUMP, FRAUD. CONVEY., 4th ed., §§ 224, 225. On principle it is difficult to say that a husband may not give away his labor to his wife as well as to another person, especially as he is the natural person to manage her property. But transactions like the present are generally mere screens to enable the husband in fact to conduct his own business more safely, or are carried out with the tacit understanding that he may use the profits to a reasonable extent for his own compensation. Therefore a hard and fast rule enabling his creditors to get at such part of the property as would represent a reasonable compensation for the husband would be equitable. See 8 HARV. L. REV. 430. If the claims of the creditors in the principal case fall within these limits, the case is to be supported.

PROCEDURE — NEW TRIAL — JUROR UNABLE TO UNDERSTAND ENGLISH. — It was discovered after verdict that a juror, who had not been challenged, was unable to understand the English language. *Held*, that this is not sufficient ground for granting a new trial. *San Antonio, etc., Ry. Co.* v. *Gray*, 66 S. W. Rep. 229 (Tex., Civ. App.).

It is very generally agreed that ignorance of the English language is a ground of challenge. *State* v. *Madigan*, 57 Minn. 425. One court, however, has held the contrary. *In re Allison*, 13 Col. 525. The proper time for challenging is before the jury is sworn; and if a party at that time knows or negligently fails to discover that any member of the panel is not qualified, and does not challenge, he is taken as waiving his right for all purposes. *Brunskill* v. *Giles*, 2 Moo. & Sc. 41; *St. Louis, etc., Ry. Co.* v. *Casner*, 72 Ill. 384. It would seem that this rule is based upon proper considerations of policy, to prevent fraud and unfair dealing by the parties. But when the cause of disqualification is not known until after the verdict, and the objecting party is chargeable with no negligence in failing to discover it, the reason for the rule is absent, and by the weight of authority the court may, in its discretion, grant a new trial. *Woodward* v. *Dean*, 113 Mass. 297. In some jurisdictions the new trial is allowed as a matter of right. *Shane* v. *Clarke*, 3 Har. & McH. (Md.) 101; *Quinn* v. *Halbert*, 52 Vt. 353. It would seem that when, as in the principal case, the unqualified member of the panel is practically a non-juror, a new trial ought unquestionably to be granted, for the verdict has in effect been found by less than twelve jurors.

PROPERTY — COVENANT AGAINST INCUMBRANCES — LOCAL ASSESSMENTS. — The defendant conveyed land to the plaintiff with a covenant against incumbrances. Prior to the sale a public improvement had been completed, and accepted by the city, and an assessment had been levied. After the sale the defendant paid the amount assessed upon the land sold. Later the assessment was adjudged illegal. Under its charter the city had no power to make a reassessment. An amendment was procured, remedying this defect, and a new assessment levied. This was paid by the plaintiff, who now sues on the covenant. *Held*, that he is entitled to recover. *Green* v. *Tidball*, 67 Pac. Rep. 84 (Wash.).

Where an unpaid assessment has been set aside the city's lien has been held not to be removed thereby. *Coburn* v. *Litchfield*, 132 Mass. 449. Similarly, where improvements have been made, but no assessment levied, so that no technical lien has attached, courts have held the land subject to an incumbrance. *Carr* v. *Dooely*, 119 Mass. 294; see also *Blossom* v. *Van Court*, 34 Mo. 390; but *cf. Harper* v. *Dowdney*, 113 N. Y. 644, *contra*. This view is based upon the right of the city ultimately to secure payment out of the land by taking proper proceedings to make a valid assessment; and considered strictly, it would seem inapplicable to the principal case where the city had, before amending its charter, no authority to make a reassessment. Considered more broadly, however, the just right of the city to contribution from this land would seem a substantial incumbrance, where, as here, the right is unenforceable because of a technical defect easily curable by legislation. Moreover technical difficulties may be avoided by allowing the reassessment to relate back to the date of the

first assessment. This view has been adopted in cases similar to the principal case. *White* v. *Stretch*, 22 N. J. Eq. 76; *Cadmus* v. *Fagan*, 47 N. J. Law 549; see also *Peters* v. *Myers*, 22 Wis. 602: but *cf. Langsdale* v. *Nicklaus*, 38 Ind. 289, *contra*.

PROPERTY — GRATUITOUS PAROL PROMISE — IMPROVEMENTS — SPECIFIC ENFORCEMENT. — The plaintiff, relying on the gratuitous parol promise of his father to give him certain land, moved thereto from a distance and made valuable improvements. The defendant had purchased from the father with notice of the promise to the plaintiff. *Held*, that equity will decree a conveyance by the defendant. *Scott* v. *Lewis*, 66 Pac. Rep. 299 (Or.). See NOTES, p. 659.

PROPERTY — POWERS — APPOINTMENT TO TRUSTEE — LAPSE. — Under a settlement, X had a general testamentary power to appoint a certain fund. By will she directed the trustees of the settlement to hold part of the fund for certain appointees and the residue for A. She then gave several legacies and bequeathed and appointed all the residue of her property to A. A died in the lifetime of X. *Held*, that X's next of kin are entitled to the residue of the settled property and it does not go as in default of appointment. *In re Martin*, 36 L. J. 670 (Eng., C. A.).

Where an executor is made trustee of property under a general testamentary power, and the beneficiary predeceases the testator, a trust will be raised for the testator's next of kin. *In re Van Hagen*, 16 Ch. D. 18. The reasoning of the courts would seem to place the case of a trustee who is not an executor on the same footing. See *In re Scott*, [1891] 1 Ch. 298; *In re Van Hagen*, *supra*. Whether this be correct or not, the present case is distinguishable. In the case of a direct appointment and the death of the appointee before the testator, it is as if there had been no appointment at all, and the property will go as in default of appointment. *In re Davies' Trusts*, L. R. 13 Eq. 163. The same conclusion seems proper in the principal case, where the trustees of the original settlement continued to hold the property and nothing was really appointed except the equitable interest. *In re Thurston*, 32 Ch. D. 508. Even in such a case, however, the testator may avert this result by showing a clear intent to blend the fund with the rest of the estate. *In re Pinède's Settlement*, 12 Ch. D. 667. But the language of the will in question hardly shows such intent.

PROPERTY — RULE AGAINST PERPETUITIES — SEPARATION OF LIMITATIONS. — Personal property was bequeathed to trustees in trust for A for life, and after her death, for such of her children as should attain the age of twenty-five years, but "in default of such issue" then over. A died without having had a child. *Held*, that the gift over is too remote. *Hancock* v. *Watson*, [1902] A. C. 14.

It seems to be settled that where a testator states two contingencies upon the happening of either of which an executory devise is to take effect, although one may be too remote, if the other is not too remote, the gift over is good in case the latter contingency happens. *Longhead* v. *Phelps*, 2 W. Bl. 703; *Jackson* v. *Phillips*, 14 Allen (Mass.) 539, 572. In the principal case, however, the two contingencies, namely, the death of A leaving no children, and the death of all her children before reaching twenty-five, are included in a single phrase; and in such cases, where the testator has not separated the contingencies, the court cannot do it, although one includes the other. *Proctor* v. *Bishop of Bath and Wells*, 2 H. Bl. 358; GRAY, PERP., §§ 331-353; *cf. Sears* v. *Russell*, 8 Gray (Mass.) 86, 98. Nevertheless, if the limitation may upon an event included in that stated by the testator, take effect as a legal contingent remainder, the court may separate the contingencies, and hold the remainder good, if the event upon which it depends in fact happens. *Evers* v. *Challis*, 7 H. L. Cas. 530. The doctrine of *Evers* v. *Challis* being confined to legal remainders, the court rightly refused to apply it to the principal case, both because the interests are equitable, and because the subject matter is personalty, contingent interests in which are always executory. GRAY, PERP., § 339. A contrary interpretation of *Evers* v. *Challis* was adopted in one case, but later discredited. See *Watson* v. *Young*, 28 Ch. D. 436; *In re Bence*, [1891] 3 Ch. 242.

QUASI-CONTRACTS — FORGERY BY AGENT — LIABILITY OF PRINCIPAL. — One X was agent for the defendant to indorse and draw checks. In the defendant's absence X forged his principal's name to stock securities of the latter, and sold them to the plaintiff, who paid in checks to the order of the defendant, with whom he supposed himself to be dealing. The agent indorsed the checks into the bank, and subsequently drew out and embezzled the amount, and most of his principal's money. The princi-

pal, on discovering his losses, obtained new stock from the corporation. The plaintiff, having returned to the corporation the certificates in his hands, brought *assumpsit* for money had and received. *Held*, that the plaintiff is not entitled to recover. *Fay* v. *Slaughter*, 62 N. E. Rep. 592 (Ill., Sup. Ct.).

Lord Mansfield laid down the rule that in such an action the defendant is liable only for the money he has actually received, and may use as a defence anything which shows that the plaintiff is not equitably entitled to recover. See *Moses* v. *Macferlan*, 2 Burr. 1005, 1010. Clearly, apart from technicalities, the defendant in the principal case was not ultimately enriched, for though the money was deposited to his credit, he never had any opportunity to use it. *Cf.* KEENER, QUASI-CONTS., 333, 334. If the defendant has not been enriched he cannot be held, since the mere fact that he had wronged the plaintiff, if shown, would not support a *quasi*-contractual action. *National Trust Co.* v. *Gleason*, 77 N. Y. 400. It has, it is true, been held that where there are two wrongdoers each is liable for the total amount of the unjust enrichment of either or both. *City National Bank* v. *National Park Bank*, 32 Hun (N. Y.) 105. Under the reasoning of this case it seems that, if the defendant could on principles of agency be held liable for the tort, he might be charged for the enrichment of the agent. Such a decision, however, appears to be opposed to the equitable theory on which actions of this sort are based, and is inconsistent with *National Trust Co.* v. *Gleason*, *supra*. See KEENER, QUASI-CONTS., 200–202. The decision in the principal case, therefore, is to be supported.

STARE DECISIS — OVERRULED DECISION — CONSTRUCTION OF WILL. — The Supreme Court of Pennsylvania held that certain expressions in an instrument created a trust. Subsequently, another case arising as to the same document, this decision was overruled. *Held*, that a will executed and taking effect between the dates of these two decisions, should be construed according to the first. *Lisle's Estate*, 58 Leg. Intel. 490 (Pa., Orphans' Ct.). See NOTES, p. 667.

TORTS — NEGLIGENCE OF SELLER OF CHATTEL — LIABILITY TO THIRD PERSONS. — The plaintiff, a servant of a manufacturing jeweller, was injured by the breaking of a drop press, negligently constructed by the defendant and sold by him to the jeweller. *Held*, that no action will lie. *McCaffrey* v. *Mossberg, etc., Co.*, 50 Atl. Rep. 651 (R. I.). See NOTES, p. 666.

TORTS — SALE OF DANGEROUS ARTICLE — FAILURE TO WARN VENDEE. — Upon the plaintiff's order the defendant sent him a quantity of phosphorus properly packed and labelled, but without any specific warning as to its dangerous qualities. The letter ordering the phosphorus showed that the plaintiff was an illiterate person, and it did not indicate for what purpose the phosphorus was intended. By reason of the plaintiff's ignorance of the nature of the substance, an explosion occurred, and the plaintiff was severely injured. *Held*, that in an action for negligence a demurrer was properly sustained. *Gibson* v. *Torbert*, 88 N. W. Rep. 443 (Ia.).

Where the dangerous qualities of an article are not matter of common knowledge, there is a general duty upon those who send or deliver such article to others to give warning of the danger incurred by handling it. *Parrot* v. *Wells, Fargo & Co.*, 15 Wall. (U. S. Sup. Ct.) 524; *Farrant* v. *Barnes*, 11 C. B. N. S. 553. But where, as in the principal case, the substance is one whose dangerous character is generally known, a vendor would seem entitled ordinarily to assume such knowledge on the buyer's part. In such cases, though not under a general duty to warn, he may still be responsible where, as in the case of a child, he knows or has reason to know that through the buyer's ignorance or inexperience harm is likely to result. *Binford* v. *Johnston*, 82 Ind. 426. Selling to an adult known to be ignorant of the danger would come within the same rule. *Wellington* v. *Downer, etc., Co.*, 104 Mass. 64. So in the principal case it should have been left to the jury to say whether from the plaintiff's letter the defendant should reasonably have suspected that the plaintiff was ignorant of the nature of phosphorus. If so the defendant should be liable.

TRUSTS — CREATING A TRUST BY DYING INTESTATE. — A woman told her father that before taking an intended foreign trip she purposed making a will in her mother's favor. The father promised that her wishes as to the property would be followed. Within ten days she died suddenly intestate. *Held*, that these facts do not warrant a conclusion that a trust for the mother attached to the father's inherited share in the daughter's personalty. *Whitehouse* v. *Bolster*, 50 Atl. Rep. 240 (Me.).

According to some authorities, a trust for a third person may arise from a transfer absolute on its face, only if such transfer was induced by fraud prejudicial to an intended beneficiary; according to others, only if the transfer resulted from a reliance on the transferee's assent to hold for such beneficiary. *Moran* v. *Moran*, 104 Ia. 216; *Tee* v. *Ferris*, 2 K. & J. 357. Courts applying these tests are frequently forced to imply an original fraudulent purpose from the transferee's act of promising; or assent from notice to him of the transferor's terms. *Dowd* v. *Tucker*, 41 Conn. 197; *Moss* v. *Cooper*, 1 J. & H. 352. Moreover, in the distinction which they involve between trust expressions in an instrument of transfer and outside expressions, these tests oppose old authority. See SHEP., TOUCH., 518. It is conceived that in all cases where property is transferred to one person with the intention that a beneficial interest therein shall go to another, the creation of a trust obligation by such transfer depends not on anything done by the transferee, but rather on the acts of the transferor; accordingly the true explanation of the cases above would seem to lie in the broad principle that a transferee is bound by terms stated as part of the act of transfer or previously communicated to him in contemplation of that act. *Cf. Davis* v. *Coburn*, 128 Mass. 377. All these rules apply as well to transfers made by voluntarily allowing property to descend as to transfers by actual conveyance. *Sellack* v. *Harris*, 5 Vin. Abr. 521; *Williams* v. *Fitch*, 18 N. Y. 546. In the principal case, on any view, the essentials of a trust were lacking. The intestate affixed none to the transfer of her property for she intended no such transfer. In fact, the contingency of a trust was not in her mind at all. Nor can a constructive trust be raised out of the receipt of the property by the father gratuitously, contrary to the former owner's intention. The same principle applies, by which, in cases of mistake by a testator, a legal title intended for one person passes absolutely to another. See *Newburgh* v. *Newburgh*, 5 Madd. 364.

TRUSTS — ESTOPPEL AGAINST TRUSTEES — PAYMENT FROM TRUST FUND. — X agreed to render legal services without charge to the defendants, as trustees of a bankrupt's estate. Afterward, he assigned to the plaintiffs whatever claim he had against the defendants for legal services, and the trustees in writing promised the plaintiffs that they would pay them whatever sum the court should allow X, and stated that the fee ought to be a large one. A considerable allowance was made to the trustees for counsel fees; but no fee was allowed to X, though he made application. A balance of $1850 remaining in the hands of the trustees, the plaintiffs put in a claim for it. *Held*, that the plaintiffs are entitled to the money. *Stone* v. *Hart*, 66 S. W. Rep. 191 (Ky.).

The language of the defendants practically amounted to a statement that the ordinary contractual relation of attorney and client existed between the defendants and X. The plaintiffs, therefore, might justly have a claim by estoppel against the defendants, the necessary change of position being found in the plaintiffs' omission to take immediate proceedings against X, who previous to this suit became insolvent. If liability is rightly incurred by trustees for the benefit of the estate, though suit is properly brought against the trustees individually, yet they are entitled to be reimbursed out of the trust property. But since, in the principal case, X had agreed to serve without fee, and the trustees acted entirely outside the line of their duty in making the contrary representation on which the plaintiffs' action is based, the trustees are not entitled to reimbursement. See LEWIN, TRUSTS, 9th ed., 725. The court therefore erred in allowing the plaintiffs' claim to be paid out of the trust fund. See *In re Johnson*, 15 Ch. D. 548. The decision seems to rest on the assumption that if the plaintiffs did not get the money it would go to enrich the trustees. On the contrary, it is submitted that whatever part of the gross sum allowed for counsel fees was not expended for that purpose, would be held on a constructive trust for the creditors of the estate.